No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD ESTABLISH A UNIFORM RULE, APPLICABLE IN MARITIME CASES, THAT SETTLEMENT BETWEEN A JOINT TORTFEASOR AND A PLAINTIFF BARS ALL CLAIMS FOR CONTRIBUTION BY NON-SETTLING DEFENDANTS AGAINST THE SETTLING TORTFEASOR?

LIST OF PARTIES

The parties are Petitioner, Boca Grande Club, Inc., and Respondent, Florida Power & Light Company. The parent of Petitioner is Great American Insurance Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

TABLE OF AUTHORITIES – Continued

No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 92) is reported at 990 F.2d 606. The order of the district court is not reported. (J.A. 88).

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1993. The Petition for Writ of Certiorari was filed on August 4, 1993 and was granted on September 28,

1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

"The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . " U.S. Const. art. III, § 2, cl.1.

STATEMENT OF THE CASE

On April 23, 1988, a sailboat collided with a high power electric line which spanned the navigable waters of the United States just north of Gasparilla Island, in Lee County, Florida. The sailboat was owned by Boca Grande Club, Inc., Petitioner (hereafter Boca Grande Club). The electric line was designed, constructed, owned and maintained by Florida Power & Light Company, Inc., Respondent (hereafter Florida Power). The sailboat was rented by Boca Grande Club to Robert Polackwich, a club member. Robert Polackwich and Jonathan Richards, his stepson, were operating the sailboat at the time of collision; both died from electrocution after the collision.

In June 1988, a lawsuit was started against Boca Grande Club and Florida Power by the personal representatives of Robert Polackwich and Jonathan Richards, and other parties, (all hereinafter collectively referred to as "Claimants") in state court seeking damages for wrongful death. Thereafter, in October 1988, Boca Grande Club started this action in United States District Court,

Middle District of Florida, Tampa Division, seeking limitation of liability as owner of the sailboat involved in the collision. (J.A. 5). Claims against Boca Grande Club were filed in the limitation action on behalf of all of the Claimants. (J.A. 27). A claim for indemnity and contribution was filed in the limitation action by Florida Power. (J.A. 10) The O'Day Corporation, the manufacturer of the sailboat, also a defendant in the claimant's state court wrongful death action, filed its claim in the limitation action seeking indemnity and contribution from Boca Grande Club. (J.A. 16).

In December 1989, Florida Power served a third party complaint against Boca Grande Club in the state court action started by Claimants. Boca Grande Club responded by filing a motion for an injunction in United States District Court. (R1-50). In February 1990, the district court entered its order enjoining the prosecution of claims against Boca Grande Club in any proceeding other than the limitation action. (R2-55).

In June 1990, Boca Grande Club filed a motion in the limitation action seeking summary judgment as to all of the claims pending in the limitation case. (R3-99). Thereafter, Boca Grande Club and the Claimants worked out a settlement of all claims filed by the Claimants in the limitation action and entered into a General Release. (J.A. 63). In December 1990, Boca Grande Club and the Claimants filed a Stipulation and Joint Motion seeking dismissal of all of Claimants' claims filed in the limitation action. (J.A. 37). In March 1991, the district court granted the joint motion and dismissed all of Claimants' claims. (J.A. 48).

In April 1991, Boca Grande Club filed another motion which sought summary judgment as to the indemnity and contribution claims of Florida Power and the boat manufacturer, the only claims left in the limitation case. (J.A. 51). On March 26, 1992, the district court granted summary judgment in favor of Boca Grande Club as to the indemnity and contribution claim of Florida Power and administratively closed the file with respect to the claims of the O'Day Corporation pending the outcome of bankruptcy proceedings involving the boat builder. The district court entered judgment in favor of Boca Grande Club following its order granting summary judgment. (J.A. 91).

In granting summary judgment the district court relied on the settlement bar rule established in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988). (J.A. 88). On April 16, 1992, the Eleventh Circuit Court of Appeals decided *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 484, 121 L.Ed 2d 388 (1992). On April 21, 1992, Florida Power filed its notice of appeal from the judgment entered in favor of Boca Grande Club. (R6-187). The summary judgment granted to Boca Grande Club by the district court was reversed by the court of appeals on May 12, 1993. (J.A. 93).

SUMMARY OF ARGUMENT

The basic question the Court must answer in this case is whether to adopt for application in maritime cases a rule that permits a settling tortfeasor to close his file and be free of claims for contribution by non-settling defendants. If the Court chooses to adopt such a rule, the Court will also need to decide how the settlement is to be treated. That is, whether it is to be set-off *pro tanto* against the plaintiff's recovery or, whether the settlement is to be treated as the extinguishment of the settling defendants' proportional fault for the entire liability and deducted *pro rata* from the plaintiff's claim.

Petitioner would be satisfied with either the *pro tanto* or *pro rata* rule because it would cure the error committed in the instant case. However, Petitioner submits that the *pro rata* or comparative fault rule is preferable because it extinguishes the proportional share of the liability of the settling defendant and makes contribution unnecessary.

All maritime courts outside of the eleventh circuit that have considered this issue have opted in favor of a settlement bar rule, either *pro tanto* or *pro rata*. The Eleventh Circuit Court of Appeals stands alone in adopting a rule which permits contribution claims to be prosecuted against a settling defendant. The decision by the court of appeals effectively negates settlement as a means for terminating multi-party maritime litigation in the eleventh circuit. The decision of the court of appeals has also created conflict within the eleventh circuit. For these reasons the decision below must be reversed.

The decision by the court of appeals below was not required by any decision of this Court. A settlement bar

rule will accommodate the principles of contribution, joint and several liability and comparative fault, which are fundamental to maritime law. A settlement bar rule will also accommodate other basic legal principles such as the efficient utilization of judicial resources and the termination of legal disputes by settlement.

Petitioner also submits that a settlement bar should be self-operative and require no oversight or administration by a court. Adoption of the *pro rata* rule which extinguishes the need for contribution results in a self-operative rule.

The Court should reverse the decision of the court of appeals in this case and establish a settlement bar rule to be applied in this case and in all future maritime cases.

ARGUMENT

Relying upon its decision in *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed 2d 388 (1992) (hereinafter "*Great Lakes*"), the Eleventh Circuit Court of Appeals reversed the summary judgment granted in favor of Boca Grande Club as to the contribution claim of Florida Power. In its opinion the court of appeals stated that "under maritime law a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606, 607 (11th Cir. 1993). (hereinafter "*Polackwich*") (J.A. 92).

The issue before this Court is, therefore, whether the decision of the Eleventh Circuit Court of Appeals in this

case, which was based on *Great Lakes*, should be reversed, with the rule that settlement bars further prosecution of contribution claims by non-settling defendants to be herein and henceforth applied in all maritime cases.

I

SETTLEMENT SHOULD BAR CLAIMS FOR CONTRIBUTION

The fundamental question the Court must answer in this case is whether settlement terminates contribution claims against settling defendants in maritime cases. If the Court implements a settlement bar rule, the Court will also need to decide whether the amount of the settlement is to be deducted *pro tanto* from a plaintiff's overall recovery or, alternatively, treated as the extinguishment of the settling defendant's proportional share of the entire liability.

Boca Grande Club submits that there ought to be a settlement bar rule because if non-settling parties are free to prosecute contribution claims against a settling defendant, there will be no settlements. Either the *pro tanto* or *pro rata* rule would operate to relieve Boca Grande Club from further litigation in the instant case. However, Boca Grande Club submits that the rule which obviates contribution because it extinguishes the settling defendant's proportional share of the total liability is more workable and will operate to make more efficient use of available judicial resources.

Before the decision in *Great Lakes*, a number of federal courts considered the question of the effect of settlement upon the continued prosecution of contribution

claims against the settling defendant in maritime cases. Those courts all opted for a rule that either barred further prosecution of contribution claims or made contribution unnecessary. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) (contribution unnecessary because settlement extinguishes proportional fault of settling defendant); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) (settlement in good faith bars contribution by non-settling defendants); *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991) (contribution unnecessary because it represents equitable share of a settling defendant's liability); *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp. 218 (S.D.N.Y. 1991) (settlement bars prosecution of contribution claims against settling defendant); *In Re The Glacier Bay*, 1993 AMC 1530 (D. Alaska 1993) (applying the rule which obviates contribution). More recently, and in the face of the decisions in *Great Lakes* and *Polackwich*, the Seventh Circuit Court of Appeals and the Alabama Supreme Court elected to establish rules that bar contribution or make contribution unnecessary. *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993) (a settlement in good faith bars claims for contribution); *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993) (contribution not necessary because settlement extinguishes proportional fault of settling defendant).

In *Leger v. Drilling Well Control Inc.*, 592 F.2d 1246 (5th Cir. 1979) (hereafter "*Leger*"), the court, relying upon the decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed 2d 251 (1975), held that a

settlement between the plaintiff and one of several defendants operated to extinguish the proportional liability of the settling defendant. The effect of this approach is to make contribution against a settling defendant unnecessary because the remaining defendants are liable to the plaintiff only for the harm caused by their collective fault. This approach also has the added benefit of making it unnecessary for a court to expend time determining whether a settlement is made in good faith. The *Leger* rule was applied by the Eighth Circuit Court of Appeals in *Associated Electric Cooperative, Inc. v. Mid-America Transportation Company*, 931 F.2d 1266 (8th Cir. 1991). The Alabama Supreme Court has similarly elected to adopt the *Leger* approach and expressly rejected the analysis and holding of the Eleventh Circuit Court of Appeals in *Great Lakes*. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993).

The decisions in *Great Lakes* and *Polackwich* stand alone. These decisions are contrary to the reasoned authority in those circuits in which the effect of settlement on contribution has been considered. *Great Lakes* and *Polackwich* are disruptive of the necessary principle requiring uniformity in the application of maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed 2d 368 (1958). Indeed, the decision in *Great Lakes* has led to direct conflict between the maritime law applied by the Eleventh Circuit Court of Appeals and the maritime law as applied in maritime cases in the State of Alabama. *Amerada Hess, supra*. It is not unlikely that the courts in other states within the eleventh circuit will reject the flawed analysis and decision in *Great Lakes*.

In considering the effect settlement is to have on claims for contribution, courts frequently start their analysis by looking at the "three possible solutions" set forth in comment m to section 886A, Restatement (Second) of Torts; the choices are:

1. Settlement has no effect upon claims for contribution. Such claims may be prosecuted by non-settling defendants against the settling tortfeasor. The Eleventh Circuit Court of Appeals is the only proponent of this solution. *Great Lakes; Polackwich.*

2. Settlement extinguishes claims for contribution. *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989) and *Rufolo v. Midwest Marine Contractor, Inc.,* No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993) adopt this position.

3. Settlement reduces the plaintiff's claim by the percentage of fault of the settling tortfeasor and thus makes contribution unnecessary. *Leger v. Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979), *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.,* 931 F.2d 1266 (8th Cir. 1991) and *Amerada Hess v. Owens-Corning Fiberglass Corporation,* 1993 AMC 2513 (Ala. 1993) follow this rule.

In *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989), the court noted that it found "no federal admiralty decision that adopts the first approach . . . " 887 F.2d at 906. Unfortunately, there are now two; namely, *Great Lakes* and *Polackwich.* As the court in *Miller v. Christopher* noted "[d]enial of a settlement bar would interfere with policies favoring settlement". 887 F.2d at 906. So far as Boca Grande Club is aware, no maritime cases other than *Great*

Lakes and *Polackwich* stand for the proposition that a settling defendant remains liable for contribution.

The solution to the problem selected by the court in *Great Lakes* and implemented in *Polackwich* has been tried and failed. The 1939 draft of the Uniform Contribution Among Tort Feasors Act adopted the solution selected by *Great Lakes;* i.e. that settlement does not affect contribution rights. However, because of "unsatisfactory" results with this approach the uniform act had to be changed. *Miller v. Christopher,* 887 F.2d at 905.

In 1955 the uniform act was revised. The first approach, the *Great Lakes/Polackwich* approach, was rejected and in its place was adopted the rule that settlement bars contribution claims. § 4(b) Uniform Contribution Among Tort Feasors Act, 12 U.L.A. 98 (1975). The comment to this section notes:

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as to say that the 1939 Act has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say that they can no longer settle cases with one tortfeasor.
>
> * * *
>
> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly, the subsection provides that the release in good faith discharges the tortfeasor outright from all

liability for contribution. 12 U.L.A. 99-100 (1975), *Miller v. Christopher*, 887 F.2d at 907.

Preservation of settlement as a viable means of terminating maritime litigation was a fundamental concern of the Seventh Circuit Court of Appeals in *Rufolo v. Midwest Marine Contractor, Inc.*, where the court, in adopting a settlement bar rule, held:

> We are at liberty, therefore, to choose any of these contribution systems and we opt for the settlement bar. Its advantages are obvious: parties can buy certainty. If they work out a deal sufficiently appealing to the plaintiff, defendants can evade the hazards of trial and the pitfalls of post-trial contribution. There is thus a huge incentive to settle cases. We are mindful that courts should not shirk their duty to decide genuine issues and controversies by tipping the scales so heavily in favor of settling that it never pays to adjudicate, but considering how clogged the court system is and how bulging the federal reporters have become, it is appropriate to encourage parties to negotiate their own solutions. 1993 WL 382496 at *3.

Non-maritime law also precludes contribution following settlement. The majority of the states protect settling tortfeasors from contribution claims by non-settling defendants.

Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota and Tennessee have enacted the Uniform Contribution Among Tortfeasors Act. 12 U.L.A. (1993 Supp. at 81).

Section 4 of that Act provides that a release given by a plaintiff to a settling tortfeasor discharges the settling party from liability for contribution to any other tortfeasor. 12 U.L.A. 98 (1975).

Iowa and Washington have adopted the Uniform Comparative Fault Act. 12 U.L.A. (1993 Supp. at 43). Section 6 of the Uniform Comparative Fault Act operates to discharge a settling defendant from all claims for contribution; this section, consistent with *Leger*, extinguishes the settling tortfeasor's share of the total liability. 12 U.L.A. (1993 Supp. at 57).

Nine other States have enacted other legislation that provides protection to settling defendants from contribution claims. See West's Ann. Cal. C.C.P. §§ 877, 877.6; Conn. Gen. Stat. Ann. § 52-57 2h(h)(2)(n); Idaho Code § 6-806; Ill. Comp. Stat. Ann. 100/2, § 2(d); Mich. Cont. L.Ann. § 600.2925d(c); Vernon's Ann. Mo. Stat. § 57.060; McKinney's Con. L. N.Y. Ann. § 15-108(b); Vernon's Tex. Stat. and C. Ann. § 33.015(d); Code of Va. § 801-35.1-A.2.

The weight of respectable authority favors a rule that permits a settling defendant to close his file and be free of claims for contribution.

II

IN REJECTING A SETTLEMENT BAR RULE THE *GREAT LAKES* COURT MISREAD *EDMONDS*

The *Great Lakes* case arose out of a collision between a tank ship and a barge and dredge moored together. The collision occurred in 1975 on the St. John's River a short

distance from the port of Jacksonville. *Great Lakes* represented the third time the case came before the court of appeals. The initial appearance of the case was in *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), where the court reviewed a judgment entered on the basis of a jury verdict finding that although the employer of the injured seamen was negligent, the negligence did not contribute to their damages. The verdict also allocated 100% of the fault for the collision to the tank ship, although neither the tank ship nor its owner was a party to the lawsuit. Thus, the injured seamen recovered nothing because, even though their employer was negligent, the jury found that the sole cause of their injuries was the fault of an absent party, the owner of the tank ship who had settled with the seamen. The court of appeals was therefore presented for review the first of what proved to be three unpalatable trial court decisions.

In *Ebanks* the seamen's employer sought to uphold the verdict in its favor by arguing that *Leger* sanctioned the allocation of fault between the participants in the collision even though one of those parties was not present at trial. As a means of circumventing the comparative fault concept entrenched in *Leger*, the seamen argued that the decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed 2d 521 (1979), reaffirmed the proposition that maritime plaintiffs enjoyed the benefit of joint and several liability and, accordingly, that *Edmonds* required that the judgment be reversed. The court of appeals accepted the argument and held that *Leger* did not apply in face of *Edmonds*, saying "[w]e also agree that if the mere language of the *Leger* case could be construed to authorize the proceedings

conducted here by the trial court, then its effect as precedent has been weakened by *Edmonds*." 688 F.2d at 720. The court proceeded to reverse the judgment and sent the case back to the trial court.

Five years later the case was back before the Eleventh Circuit Court of Appeals as *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988). *Self* involved the claim of the widow of a seaman employed on the dredge who was killed as a result of the collision. At trial the court determined that the collision was 70% the fault of the owner of the tank ship and 30% the fault of the seaman's employer, the dredge owner. But, before the trial, the widow settled with the owner of the tank ship who was ultimately found to be 70% at fault. At trial the total of plaintiff's damages was ascertained but, upon the basis of *Leger*, judgment was entered for only 30% of that total. The widow had made a bad bargain which the court of appeals proceeded to rectify. The court first pointed to its earlier decision in *Ebanks* where it had held that *Leger* had "been weakened by *Edmonds*." 688 F.2d at 720. The court then determined that "[b]ecause of these distinctions, namely the change in the law by *Edmonds* and *Ebanks*, and the differences in the facts, we do not consider *Leger* as controlling our opinion in this case." 832 F.2d at 1547. The court held that the widow was entitled to recover full damages from the owner of the dredge less the amount paid in settlement by the owner of the tank ship. 832 F.2d at 1548. Thus, the court of appeals effectively elected the *pro tanto*/contribution bar rule. 832 F.2d at 1547-48. The court also pointed out that

the difficult facts in the case made its "decision compelling." 832 F.2d at 1548, n.5.

In 1992 the case made its third trip to the court of appeals in *Great Lakes*. The district court, on the basis of the decision in *Self*, granted summary judgment in favor of the settling tank ship owner on the contribution claim of the dredge owner. *Great Lakes Dredge & Dock Co. v. Tanker*, 1990 AMC 2247 (M.D. Fla. 1990). After the second appeal the dredge owner settled with the widow Self for something in excess of two million dollars and was interested in obtaining a sizable contribution from the tank ship owner who had been found 70% at fault for the collision. Thus, the court of appeals was squarely faced with the contribution issue in a third unhappy factual context; i.e. the party 30% at fault had paid most of the damages but was barred from contribution against the settling tortfeasor who was 70% at fault. To alleviate the predicament of the unhappy dredge owner, the court of appeals ruled that what it had said in *Self* about a settlement bar rule was *dicta*. The court reversed the judgment below and held that in maritime cases in the eleventh circuit an action for contribution may be maintained against a settling tortfeasor. 957 F.2d at 1582-83.

Ebanks, *Self* and *Great Lakes* are perfect examples of the adage that hard cases make bad law. *Edmonds* was used to circumvent *Leger* in order to achieve a "compelling" result. *Edmonds* should have been, and should be, limited to its facts; namely, to cases involving a statutory bar against a party such as the employer of longshoremen. *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266, 1270-71 (8th Cir. 1991). In *Reliable*, this Court brought the maritime law of the

United States into harmony with the law of other maritime nations by adopting comparative fault. Since this Court's decision in *Reliable*, the concept of comparative fault has rapidly expanded and is fast becoming the law of the land. It is therefore illogical to read *Edmonds* as limiting *Reliable* or to use *Edmonds* to circumvent or discredit *Leger*, which is a perfect example of the implementation of the comparative fault rule laid down by this Court.

Edmonds did not weaken *Leger*. *Leger* did not do any damage to the concept of joint and several liability. Furthermore, *Edmonds* was essentially a restatement, following the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905, of the proposition that the Act limited an employer's liability. See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed 318 (1952).

Great Lakes and *Polackwich* must be reversed and replaced by a settlement bar rule. Otherwise, settlement will no longer be available to terminate multiple-party maritime lawsuits in the eleventh circuit. For the reasons mentioned in Point III, *infra*, the *Leger* rule is preferable. However, the *pro tanto*/settlement bar rule is also workable. Adoption of either rule will permit Boca Grande Club, as a settling tortfeasor, to obtain the benefits intended by its settlement and to close its file in this case.

III

A SETTLEMENT BAR RULE DOES NOT VIOLATE FUNDAMENTAL PRINCIPLES OF ADMIRALTY LAW

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed 2d 694 (1974) (hereinafter *"Cooper"*), this Court acknowledged the right of contribution between joint tortfeasors in maritime cases. In *United States v. Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed 2d 251 (1975) (hereinafter *"Reliable"*), the Court established the principle of comparative fault in collision cases, noting that comparative fault had applied for many years in maritime personal injury actions. And in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed 2d 521 (1979) (hereinafter *"Edmonds"*) the Court held that the concept of joint and several liability applies in maritime cases. By these decisions comparative fault, joint and several liability, and contribution among joint tortfeasors became established in the maritime law of the United States.

A rule that affords protection to a settling defendant from claims for contribution must take these concepts into account and also give effect to other basic legal tenets; namely, settlement and the efficient utilization of judicial resources. The law favors the "just, speedy, and inexpensive determination of every action." Rule 1, Federal Rules of Civil Procedure. The law favors settlement. *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed 2d 1 (1985); *Delta Air Lines Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed 2d 287 (1981) (Powell, J. concurring):

> "On the other hand, parties to litigation and the public as a whole have an interest – often an overriding one – in settlement rather than

> exhaustion of protracted court proceedings." 450 U.S. at 363.

"The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto." *Pfizer Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972), *cert. denied*, 406 U.S. 976, 92 S.Ct. 2411, 32 L.Ed 2d 676 (1972).

The rule adopted in *Great Lakes* and applied in *Polackwich* does not encourage settlement – it inhibits it. Rather than promoting efficient utilization of judicial resources and the inexpensive determination of lawsuits, *Great Lakes* promotes litigation. The rule contemplates that at some stage of the lawsuit the settling tortfeasor (if hereafter there ever is one) must come back to court so it may be determined if he shall pay more to the other defendants. Furthermore, the conflict created by the *Great Lakes* decision is intolerable, *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993), and the decision should not be permitted to stand.

Comparative fault, joint and several liability and contribution can be adequately accommodated while protecting a settling tortfeasor from contribution claims. The best solution is the rule crafted by the Fifth Circuit Court of Appeals in *Leger*.

Under *Leger* the settling tortfeasor's share of the total liability is extinguished in conformity with *Reliable*. The plaintiff continues the action against the remaining defendants and may recover from them jointly and severally as authorized by *Edmonds*, and those defendants have, as

between themselves, the right of contribution authorized by *Cooper*.

The *pro tanto* setoff/settlement bar rule applied by the courts in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989), and *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993), is a workable solution. Under this approach the dollar amount of the settlement is deducted from the plaintiff's total claim leaving plaintiff to pursue the remaining tortfeasors jointly and severally for the balance. As between the remaining defendants there is the right of contribution. However, the settling defendant is free of the case and all claims for contribution against him are extinguished. This solution does run afoul of *Reliable* to the extent that the *pro tanto* setoff may be greater or less than the actual proportionate fault of the settling tortfeasor depending upon whether plaintiff made a good or bad settlement. Otherwise this approach preserves a plaintiff's *Edmonds* mandated right of joint and several liability as to the remaining defendants as well as the defendants' *Cooper* created right of contribution between themselves. Furthermore, the allocation of fault between the remaining defendants on the contribution claims will be undertaken in accordance with the comparative fault principles as required by *Reliable*. This approach also fosters the efficient resolution of disputes by permitting a defendant to terminate its liability with a plaintiff and escape the litigation. The single drawback to the *pro tanto* approach is its lack of symmetry; i.e., the amount paid to extinguish the liability of the settling party is likely to be either more or less than that defendant's proportional share of the total liability. The *pro tanto* approach appears

to be used by courts that are concerned that a plaintiff may make a bad bargain with a settling defendant. However, it is submitted that this overly solicitous attitude toward plaintiffs is probably outdated. More often than not, when time for settlement discussion comes around, the plaintiff and his lawyers have a pretty fair idea as to which among the various defendants are the more culpable. The more enlightened approach ought to be to hold the plaintiff to his bargain and extinguish that portion of the total liability represented by the proportional fault of the settling defendant. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993).

Either rule promotes settlement and the economical use of judicial resources. Neither rule violates basic precepts of admiralty law.

IV

A SETTLEMENT BAR RULE SHOULD REQUIRE NO JUDICIAL OVERSIGHT

Boca Grande Club submits that, ideally, a properly functioning settlement bar rule should be self-operative. If settlement operates as a bar to contribution claims only after the settlement has been judicially sanctioned as being in good faith the attractiveness of settlement is diminished. This practical fact was most recently recognized in the concurring opinion in *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496, at *8 (7th Cir. Sept. 29, 1993), where Judge Eisele wrote "[a] mini-trial concerning the merits of the settlement will usually be required to determine whether the liability

assumed by the settling tortfeasor is reasonably related to the strength of the plaintiff's claims."

The criticism of a good faith condition by the court in *In Re The Glacier Bay*, was harsher:

> "In cases such as this, where there are large sums of money at risk, a good faith hearing would not be merely an affidavit-type of proceeding, but a not-so-mini-trial. A good faith hearing is simply neither an effective nor efficient use of judicial resources." 1993 AMC at 1536.

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) is a perfect example of the continued expenditure of judicial resources generated by a good faith condition. One of the issues in the appeal in *Miller* was whether the district court was correct in finding the settlement in that case to have been undertaken in good faith. A party that settles wants to avoid all further judicial entanglement and most certainly does not want to be involved in an appeal to determine if his settlement is to be given effect.

Decisions in non-maritime cases have also criticized co..ditioning contribution on a good faith condition. In *Franklin v. Kaypro Corporation*, 884 F.2d 1222, 1230 (9th Cir. 1989), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed 2d 192 (1990), the court of appeals noted:

> "In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement."

In *Donovan v. Robbins*, 752 F.2d 1170, 1181, (7th Cir. 1985) the court noted that an inquiry into whether a settlement

is fair "means bogging down the settlement process in a miniature trial before trial, . . . "

As the concurring opinion in *Rufolo* points out, application of *Leger* avoids all of the practical difficulties attendant upon an inquiry as to whether a settlement is in good faith. Because application of the *Leger* principle extinguishes the proportional fault of the settling defendant, the remaining defendants need not be concerned about good faith because they will be liable only for their own collective fault and not for any of the fault of the settling defendant.

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should adopt for application in this case and future maritime cases a rule that settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by non-settling tortfeasors against the settling tortfeasor.

Respectfully submitted,

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
P.O. Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
P. O. Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner